No. 21307, No. 21307A, No. 21307B, No. 21307C

United States Court of Appeals

FOR THE NINTH CIRCUIT

FLUOR CORPORATION, LTD., *et al.*,
UNION TANK CAR COMPANY,
WARD INDUSTRIES CORPORATION,

Appellants,
Cross-appellees,

—v.—

U. S. A., EX REL MOSHER STEEL COMPANY,

Appellee,
Cross-appellants.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

BRIEF OF CROSS-APPELLEE, WARD INDUSTRIES CORPORATION

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The plaintiffs and cross-appellants, UNITED STATES OF AMERICA for the use of Mosher Steel Company and Mosher Steel Company ("Mosher"), cross-appeal from so much of the final judgment in their favor for the sum of $268,882.92, dated and entered May 24, 1967, against the defendants Union Tank Car Company ("Union") and Ward Industries Corporation ("Ward"), and for the sum of $246,165.96 against the defendants Fluor Corporation, Ltd. ("Fluor"), Federal Insurance Company, Vigilant Insurance Company, Insurance Company of North America, General Insurance Company of America, Seaboard Insurance Company, American Reinsurance Company, Employees' Re-Insurance

Group and General Re-Insurance Group ("the sureties"), which failed to award pre-judgment interest to the plaintiff.

Mosher's present cross-appeal was filed after Ward appealed to this Court from the judgment against it, seeking a reversal thereof and a dismissal of Mosher's causes of action against Ward upon the merits. If Ward's appeal is successful, then, as to it, Mosher's claim for pre-judgment interest, which is the subject matter of Mosher's cross-appeal, will become academic and moot. Nothing contained in this brief by Ward should be deemed or construed to constitute an admission, direct or indirect, express or implied, that there is any merit, substance or justification for the judgment entered by the District Court in favor of Mosher against Ward.

Jurisdictional Statement

Jurisdiction of the cross-appeal is claimed to exist pursuant to Sections 1291 and 2107, Title 28, U.S.C.

The Nature of the Case

The plaintiffs and cross-appellants, United States of America for the use of Mosher Steel Company and Mosher Steel Company, brought this action in the United States District Court for the District of Arizona: (1) against the defendants Union, Fluor, the sureties and Ward for the sum of $298,336.58, which it claimed was due and owing to it for the fabrication and delivery to Union of certain steel owned by Union and incorporated by Union in the Titan II Missile Launch Facilities near Tucson, Arizona (the Tucson project), and the freight charges relating thereto; and (2) against the defendants Union and Ward

for the sum of $22,716.96, which Mosher claimed was due and owing to it for the fabrication and delivery of steel owned by Union and incorporated by Union in the Missile Launch Facilities at the Vandenberg Air Force Base, Vandenberg, California (the Vandenberg project), and the freight charges relating thereto. The total amount sought by Mosher was the sum of $321,053.54.

On February 2, 1962, prior to the commencement of this action, IMI filed a voluntary petition under Chapter XI of the Bankruptcy Act in the United States District Court, Southern District of California, Central Division. On July 5, 1962, Mosher filed a proof of claim in the IMI Chapter XI proceedings, wherein it alleged that IMI was indebted to Mosher for the steel fabricated and delivered to the Tucson project in the amount of $298,336.58, and for the steel fabricated and delivered to the Vandenberg project in the amount of $22,716.96 (R 1236).

On December 31, 1963, pursuant to a plan of arrangement and in satisfaction of Mosher's claim against IMI, the Referee in Bankruptcy in the IMI Chapter XI proceeding ordered the issuance to Mosher of 642,107 shares of IMI stock. Subsequent to the date of that order, but prior to the actual issuance of the stock, IMI changed its name to Allied Equities Corporation and declared a one to twenty "reverse" split (R 1237). As a result of these proceedings, Mosher actually received 32,105 shares of Allied Equities stock as a payment upon its open book account. That payment obviously diminished the amount of Mosher's claim against Union and/or Ward arising out of the transactions which are the subject matter of this lawsuit.

Since the distribution to Mosher from the IMI bankruptcy proceeding took the form of stock rather than cash, a serious issue arose during the trial below as to the value, in dollars, of the 32,105 shares of Allied Equities stock re-

ceived by Mosher and the amount, in dollars, by which Mosher had been paid.[1] That issue, raised by Ward's answer (R 330), was only resolved when the parties, at the close of the plaintiff's case, stipulated upon the record that the shares of Allied Equities stock received by Mosher possessed a value of $1.625 per share, and that the total dollar value of the stock so received was the sum of $52,170.62 (R 1237).

It is thus apparent that the amount of Mosher's claim could not possibly be ascertained until the value of the Allied Equities stock was determined. Until the value of that stock was determined, Mosher's claim was unliquidated. Since Mosher's claim was unliquidated, the Court below was correct in denying Mosher's motion for pre-judgment interest.

The Sole Issue Presented by This Cross-Appeal

The sole issue presented by this cross-appeal is whether, if the judgment of the Court below be affirmed as to Ward, the plaintiff is entitled to interest at the rate of 6% per annum from March 31, 1962 until May 24, 1966, the date when the District Court's judgment was entered in its favor.

In Finding of Fact No. 53, the Court below found as follows (R 1237):

> "53. On December 31, 1963, the Referee, pursuant to a plan of arrangement, ordered issued to Mosher in

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[1] The inordinate difficulties of determining the monetary value of the stock of a company newly emerged from the bankruptcy court is reflected by the classic discussion contained in Bonbright, "Valuation of Property", Volume 1, Part 1, pp. 3-65. It is likewise demonstrated by the fact that, within sixteen months after the conclusion of the trial herein, the stock of Allied Equities was quoted at prices ranging from $12\frac{3}{8}$ to $12\frac{7}{8}$ per share (R. pp. 1337-1338).

> settlement of its claim against the debtor, IMI, certificates for 642,107 shares of IMI stock (Union Ex. D in evidence). Thereafter, IMI changed its name to Allied Equities Corporation and the stock was actually issued in a 1 to 20 'reverse split' (Jt. Ex. 39 in evidence), whereby Mosher received 32,105 shares of Allied Equities Corporation stock, the value of which has been established by stipulation of all parties to this action at $1.625 per share, or a total of $52,170.62 (RT 682). * * *"

Based upon Finding No. 53, the Court thereupon concluded (Conclusion of Law, No. 15; R 1240):

> "Inasmuch as Mosher's claims against all parties are unliquidated, until judgment is entered no interest is recoverable prior to the entry of judgment herein."

In view of the above, the Court below properly held that the dollar value of the Allied Equities stock which Mosher had received from IMI pursuant to the IMI plan of reorganization, as a payment upon its open account, was unascertainable until it was stipulated by the parties at the trial. The amount of Mosher's claim was therefore unliquidated, since it could not possibly have been determined prior to the trial by any method of computation or calculation.

ARGUMENT

POINT I

The Court below correctly found that the amount allegedly due to Mosher was unliquidated until the value of the IMI stock received by Mosher was determined by the Court. Mosher was therefore not entitled to pre-judgment interest upon the amount ultimately found to be due.

The dollar value of the IMI stock, as has been noted, was only ascertained by the Court at the trial as a result of a stipulation between the parties resolving that issue. Until it was so resolved, the amount of Mosher's claim against Union and/or Ward could not possibly be determined. Since it was neither fixed, certain nor ascertainable by calculation, it necessarily constituted an unliquidated claim.

It has been uniformly held by the Federal Courts that the law of the forum State applies to a determination of whether pre-judgment interest may be allowed upon a judgment rendered by the Federal Court sitting in such state. See, for example, *Pacific State Steel Corporation* v. *Isaacson Iron Works,* 320 F. 2d 624 (9 CA, 1963), which applied California law. While the Courts of Arizona have not passed upon the issue presented by the case at bar, it was held, in *Schwartz* v. *Schwerin,* 85 Ariz. 242, 336 P. (2d) 144 (Supreme Court, Arizona, 1959), that no interest may be allowed upon a judgment rendered upon an unliquidated claim.

In *Pacific State Steel Corporation* v. *Isaacson Iron Works, supra,* a case remarkably akin to the instant action, this Court ruled as follows in disallowing a claim for interest in a judgment based upon an open book account:

"* * * The trial judge relied upon 1 Cal. Jur. 2—'Accounts and Accounting,' sec. 40, p. 363:

'With respect to the allowance of interest, accounts ordinarily draw interest only from the day on which they are settled and a balance is ascertained. The provision of the Civil Code [note] that every person who is entitled to recover damages that are certain or capable of being made certain by calculation, the right to which is vested in him upon a particular date, may also recover interest thereon from that date, has no application to actions to recover upon an open book or mutual account that was never settled or balanced, or to the items of the account as they become due, even though the claim be for goods sold and delivered.' * * *"

None of the authorities cited by Mosher in its brief as "persuasive" (Mosher Br., p. 11) are applicable to the facts at bar. *Macri and Sons, Inc.* v. *U. S. A. for the use of Oaks,* 313 F. 2d 119 (9 CA), dealt with an *unliquidated counterclaim* interposed to an *indebtedness admittedly due. American Surety Co. of N. Y.* v. *U. S. A. for the use of B & B Drilling Co.,* 368 F. 2d 475 (9 CA) dealt with an *unliquidated set-off* to a claim which was certain and fixed.

In the instant case, Mosher's recovery in the IMI bankruptcy proceedings of 32,105 shares of Allied Equities stock in satisfaction of its claim was not, and could not possibly have been, the subject matter of a counterclaim or set-off by Ward. They were not property in which Ward possessed any proprietary interest whatsoever. Mosher's receipt of those shares constituted, precisely as Ward alleged as an affirmative defense in its answer (R., 330), a *payment* by IMI upon an existing open account which diminished the amount of that account by the dollar value of the payment when that dollar value was finally ascertained. Until the

dollar value of the payment was judicially fixed by the final judgment entered herein, the amount of the claim itself was obviously unknown, indeterminate and unliquidated.

CONCLUSION

For all of the reasons hereinabove set forth, it is respectfully submitted that the Court below properly refused to grant pre-judgment interest.

Respectfully submitted,

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Certificate of Compliance

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney